Friday, May 16.

FIRST DIVISION.

[Sheriff of Inverness, Elgin, and Nairn.

REID *v.* M'BAIN AND OTHERS.

Cessio—Petition by Debtor—Refusal in hoc statu.

In a petition for cessio by a debtor it appeared from the state of affairs lodged by the petitioner that his liabilities amounted to £183, and his assets to £15. It also appeared from his deposition that after his affairs had begun to be involved he had disponed to his daughters the house in which he lived, and discharged a debt to one creditor by transferring to him a boat which he valued at £120. All his creditors opposed the application. The Sheriff refused the petition *in hoc statu*, and on appeal the Court adhered.

Opinion (*per* Lord Shand) that the fact that the estate was of very small amount was not of itself any reason for refusing to grant decree of cessio.

This was a petition for cessio presented by Alexander Reid, fisherman in Branderburgh, against George M'Bain junior, C.A., Aberdeen, trustee on the estate of Robert Anderson, baker, Lossiemouth, and others, the petitioner's creditors.

The petitioner averred that he had on 16th December 1889 been charged by one of his creditors on an extract decree for £7, 10s. 9d., that following on said charge his effects had been poinded on 14th January 1890, and that he was insolvent and unable to pay his debts.

From the state of affairs lodged by the petitioner it appeared that his liabilities amounted to £183, 19s. 9d., and his assets to £15, 4s.

The petitioner deponed that he began to get into difficulties in 1884. In 1887 he disponed the house in which he was still living to his two daughters, who were at that date aged 20 and 18 years respectively, and were both unmarried. The price paid for it was £24 in cash and certain work which his daughters had done for him. In 1886 he borrowed £60 from Andrew Bremner, a fishcurer, and in payment of this debt at the end of the fishing in 1889 he transferred to Bremner by bill of sale his boat, which he valued at £120.

The application for cessio was opposed by the petitioner's creditors.

On 12th February 1890 the Sheriff-Substitute (RAMPINI) *in hoc statu* refused the prayer of the petition.

"*Note.*—All the creditors, the Sheriff-Substitute understands, oppose the granting of cessio, and looking to the petitioner's state of affairs he cannot see what benefit would accrue to them by granting it. If the petitioner chooses to renew the application later on, when, through his own industry, he has acquired an estate which will give his creditors a reasonable dividend, the Sheriff-Substitute may possibly be disposed to take a different view of the case. But at present he thinks he is bound to refuse it."

The petitioner appealed to the Court of Session, and argued—The Sheriff was not justified in refusing cessio. The interest of the creditors was not to be considered to the exclusion of the interest of the debtor. Want of estate was no objection to sequestration being granted—*Gardner* v. *Woodside*, June 24, 1862, 24 D. 1133; 34 Scot. Jur. 564. Nor was it an objection under the Cessio Act—*Ross* v. *Hairstens*, November 16, 1885, 13 R. 207; Act of Sederunt, December 22, 1882, sec. 17. The creditors' rights were made safe under sec. 7 of 44 and 45 Vict. c. 22.

There was no appearance for the creditors.

At advising—

LORD PRESIDENT—After considering the papers which the Sheriff-Substitute had before him in pronouncing the interlocutor of 12th February, I have come to be of opinion that he took the right course in refusing to grant cessio. That it was within his competence to refuse cessio I do not doubt, and that being so, I am not prepared to interfere with the exercise of his discretion.

LORD SHAND—It is not without difficulty and only on special grounds that I can give my adherence to the decision of the Sheriff-Substitute, but I have come to the conclusion that I can do so in consideration of the right which the statute gives to refuse to grant cessio *in hoc statu*.

Prior to 1880 the process of cessio was used for many years mainly if not entirely as a protection against imprisonment, but in the Act 43 and 44 Vict. c. 34, abolishing imprisonment for debt, it was enacted, that notwithstanding the abolition of imprisonment, the process of cessio should continue to exist, and that anyone who was notour bankrupt might apply for cessio with the effect of protecting the applicant against diligence affecting his property—that is to say, any future property he might acquire. The result accordingly of the statutes of 1880 and 1881 is, that as by the latter Act it is provided that a person petitioning for cessio may apply for and obtain his discharge in that process, the double purpose of cessio is the distribution of the bankrupt's estate and the discharge of the bankrupt. A means is in this way provided for debtors having small estates obtaining a discharge, for under the provisions of the later Act persons who have not any creditor to the amount of £50, or several creditors for the gross amounts mentioned in section 14 of the Bankruptcy Act of 1856, have become entitled to the same privileges as bankrupts under the old statutes. The objects and result of the process of cessio now are the distribution of the bankrupt's estate, and the obtaining the debtor's discharge provided he comply with the conditions on which it under the statute may be granted.

A bankrupt is thus entitled to apply for a discharge in the cessio, and I am of opinion

that it is no answer to say that his estate is very small, because the purpose of the Legislature is to put debtors with small estates in the same position as bankrupts with large estates, or indeed to put the former in a more favourable position, for they do not require the consent of their creditors to the petition for cessio, as a bankrupt requires certain statutory consents of creditors in applying for sequestration.

The application being competent, the question comes to be, on what grounds is it to be refused? The Sheriff-Substitute says —"All the creditors, the Sheriff-Substitute understands, oppose the granting of cessio, and looking to the petitioner's state of affairs he cannot see what benefit would accrue to them by granting it." I am of opinion that that is not a good reason for refusing cessio. I think that although the bankrupt has a small estate, and it would be of little if any real benefit to his creditors to have it distributed, if he has incurred losses by innocent misfortune so as to be insolvent, he is entitled to cessio without the consent of his creditors. Though all the creditors oppose the granting of cessio on the ground that the estate is a very small one, I do not think that the small amount of the estate can deprive the petitioner of his right to apply for cessio and a discharge.

The Act of 1880 provides, however, that the Sheriff may refuse cessio *in hoc statu*. The real purpose of this provision is, I think, that if the Sheriff should have reason to suppose that the bankrupt is keeping back part of his estate—and it may be on other grounds arising out of the bankrupt's conduct—he may have power to refuse to grant a discharge for a time. I am not sure that it can be said to be clear in this case that the bankrupt is keeping back estate, but there is a peculiar circumstance which, I think, justifies the Sheriff in taking the course he did. I find that while the bankrupt has incurred debts to the amount of £183, the main part of his estate has been given away entirely to two persons. He had a boat of considerable value, worth according to his own statement £120, and a house. It appears from his deposition that he transferred the boat to one of his creditors, and his house to his own daughters with whom he lives, I understand, in the house so given away. These circumstances, I think, suggest that the debtor is trying to evade the claim of his creditors, and has not fully accounted for his property, and therefore there is fair reason for believing that if the proceedings are continued by the refusal of a discharge *in hoc statu*, some funds may yet be found and made available for the payment of creditors.

On that ground, but not on the ground stated by the Sheriff-Substitute, I concur in adhering to the judgment.

It should be observed that under the statutes a bankrupt can only apply for discharge six months after decree of cessio has been granted, and then he has to show either that he has paid 5s. in the pound on his debts, or that his failure is due to causes for which he is not responsible. On the question of his discharge coming up, such considerations as these will arise, but I do not think that it is a proper course to refuse to grant cessio either absolutely or *in hoc statu* on grounds which should be properly stated as objections to his discharge.

LORD ADAM — This is an application under the 7th section of the Debtors Act of 1870, and the prayer is that the petitioner should be found entitled to the benefit of cessio, that a trustee should be appointed, and the expenses of obtaining the decree and the disposition *omnium bonorum*, if executed, be paid out of the readiest fund conveyed by such decree or disposition. We see that the funds which it is proposed that the trustee should be appointed to administer consist of "20 herring nets (all old)" and a few other items, the total value of which is stated to be £15, 4s. which, it appears to me, is an exceedingly liberal estimate. Accordingly, the case is one in which there are practically no assets, and yet it is proposed that a trustee shall be appointed, and the machinery of the Act set in operation although there are no funds to pay for it.

The application is perfectly competent, but I do not think it follows that it must be granted. I think it is for the Judge before whom it comes to exercise his judgment whether the decree should be granted and the estate be administered in terms of the Act. Recent changes have altered the nature of the old process of *cessio bonorum*. The process under the recent statutes is now a means for distributing small estates of persons in a lower rank of life from that to which the Bankruptcy Acts more properly apply. Distribution being the primary purpose of the process, when I see that in point of fact there are no funds to distribute and none wherewith to pay the expense of the necessary proceedings, where there is no one to become a trustee, and the bankrupt's one object is to obtain a discharge at the end of six months, I agree with your Lordships that such a petition should not be allowed to proceed.

LORD M'LAREN—I agree with your Lordship that the duty of the Sheriff under the Debtors Act 1880 is materially different from the duty of the same judge under the Bankruptcy Acts. In an application in the latter case the control of the proceedings is given to the creditors, and when the petition has been presented, if the debtor is notour bankrupt and has the requisite concurrence, the Lord Ordinary or the Sheriff has no option, for the Statute says that he "shall forthwith issue a deliverance by which he shall award sequestration." But under the Debtors Act the provision is that the Sheriff on considering the case, or, if necessary, on taking evidence, "shall either grant decree . . . or refuse the same *in hoc statu*, or make such other order as the justice of the case requires." It is therefore plain that the intention of the Legislature was that the

Sheriff should exercise his discretion in the matter. Among the elements which would legitimately influence the Sheriff in granting the cessio would be the sentiments of the creditors regarding the conduct and behaviour of the debtor, and the opinion which the Sheriff might himself be able to form as to whether a full disclosure of his affairs had been made by the debtor. In the present case we have the opposition of all the creditors, which is not a favourable element, and there is further no estate to divide. There is also, as Lord Shand has pointed out, some indication that a part of the estate has been put by the debtor beyond his control. These are reasons for treating this case exceptionally, and as the Sheriff has exercised his discretion adversely to the petition I am for refusing the appeal.

The Court accordingly refused the appeal.

Counsel for the Petitioner — Gillespie. Agent—William Considine, S.S.C.

Friday, May 16.

SECOND DIVISION.

[Sheriff of Forfarshire.

M'FEE *v.* LITTLEJOHN (BROUGHTY FERRY POLICE COMMISSIONERS) AND THE CALEDONIAN AND NORTH BRITISH RAILWAY COMPANIES.

Reparation—Driver Killed by Low Arch—Police Commissioners — Public Duty — Negligence.

A railway company in feuing land on either side of a railway embankment undertook to give their feuars access of not less than 7 feet in height. They continued a public street up to the embankment which they pierced with 3 apertures, which did not exceed the specified height. The lands were largely feued, and some years subsequently the street was taken over by the Police Commissioners, who in metalling and levelling it, raised the roadway under the centre arch, until the height left only amounted to 6 by 9 inches. The Commissioners took no measure to secure the safety of the public in using the road.

In attempting to drive under this bridge at night a cabman was crushed against the roof of the bridge and killed.

In an action by his widow against the railway companies who owned the embankment and the police commissioners—*held* that the latter were liable in damages in respect of their failure either to make the road safe or to stop traffic on it.

When the Dundee and Arbroath Railway was made the line ran along an embankment in the neighbourhood of Broughty Ferry. The Railway Company possessed the land on each side of the embankment. As the town expanded the Railway Company resolved to feu this land, and they continued through it Brook Street of Broughty Ferry. They pierced the embankment with three openings at the point of its intersection with Brook Street, and gave their feuars an access through the embankment of "not less than 7 feet" in height. The middle opening of the three was intended to serve as a carriageway.

Broughty Ferry gradually approached and was built up around this point, and in 1864, as a populous place, adopted the General Police Act 1862. Among other streets the Police Commissioners appropriated Brook Street, and in levelling and metalling it they raised the roadway under the low arch of the embankment until it only possessed a headway of 6 feet 9 inches. No means were taken either by the Railway Company or by the Commissioners of Police to protect the public against the dangers of this low arch.

By the North British Railway Dundee and Arbroath Joint-Line Act 1879 the interest in the Dundee and Arbroath Railway was transferred to and vested in the Caledonian Railway Company and the North British Railway Company jointly and equally.

Between ten and eleven o'clock on the night of Saturday 8th December 1888 Peter Myles M'Fee, a cab-driver in Dundee, was engaged to drive from the Arbroath Station, Dundee, to Broughty Ferry. M'Fee reached Broughty Ferry shortly after eleven o'clock. On reaching the Ferry he drove along Brook Street. The bridge before mentioned spans Brook Street, and M'Fee drove right on with the object of passing under the bridge. In attempting to do this, M'Fee, who was sitting on the driver's seat, was jammed between the bridge and the roof of his cab, and killed.

His widow raised this action against the Police Commissioners of Broughty Ferry and their clerk David Stewart Littlejohn as representing them, and the Caledonian Railway Company and the North British Railway Company as a joint Railway Company, concluding for damages for herself and her two pupil children.

The pursuer averred—"The Railways Clauses Consolidation (Scotland) Act 1845, which was passed prior to the construction of said branch line, and which is incorporated in the Act authorising its construction, provides and enacts (section 42)—'Every bridge to be erected for the purpose of carrying the railway over any road, except as otherwise provided by the special Act, shall be built in conformity with the following regulations (that is to say)—*Width of Arch*—The width of the arch shall be such as to leave thereunder a clear space of not less than 35 feet if the arch be over a turnpike road, and of 25 feet if over a public carriage road, and of 12 feet if over a private road. *Height of Arch over Public Road.*—The clear height of the arch from the surface of the road shall be not less than 16 feet for a space of 12 feet if the arch be over a turnpike road, and 15 feet for a